

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Tradearbed Inc. :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years 1971 - 1975. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Tradearbed Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tradearbed Inc.  
825 Third Ave.  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
27th day of May, 1983.

David Parchuck

William P. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Tradearbed Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years 1971 - 1975. :

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of May, 1983, he served the within notice of Decision by certified mail upon Alvin Schwartz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alvin Schwartz  
Kandel, Schaeffer & Schwartz  
8 Freer St., Box 360  
Lynbrook, NY 11563

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
27th day of May, 1983.

David Parchuck

Annice McLaughlin

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 27, 1983

Tradearbed Inc.  
825 Third Ave.  
New York, NY 10022

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alvin Schwartz  
Kandel, Schaeffer & Schwartz  
8 Freer St., Box 360  
Lynbrook, NY 11563  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
TRADEARBED, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1971	:	
through 1975.	:	

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Petitioner, Tradearbed, Inc., 825 Third Avenue, New York City, New York 10022, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1971 through 1975 (File No. 26057).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 16, 1982 at 10:30 A.M. Petitioner appeared by Kendel, Schaeffer & Schwartz, CPA's (Alvin Schwartz, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division, in revising petitioner's business allocation percentages, properly recalculated the petitioner's receipts factor on the basis that petitioner was a selling agent of an alien producer corporation.

FINDINGS OF FACT

1. Petitioner, Tradearbed, Inc.,<sup>1</sup> filed corporation franchise tax reports<sup>2</sup> for the years 1971 through 1975 which show entire net income and business allocation percentages as follows:

<u>YEAR</u>	<u>ENTIRE NET INCOME</u>	<u>BUSINESS ALLOCATION PERCENTAGE</u>
1971	\$251,895.00	61.527
1972	\$380,805.00	60.740
1973	\$420,464.96	59.49
1974	\$846,351.79	54.4449
1975	\$340,558.00	56.75308

2. On December 15, 1978, the Audit Division issued a separate Notice of Deficiency for each of the periods ended December 31, 1971, December 31, 1972, December 31, 1973, December 31, 1974 and December 31, 1975 showing, respectively, a tax deficiency of \$6,142.44 plus interest of \$1,335.98 for a total due of \$7,478.42, a tax deficiency of \$9,337.47 plus interest of \$1,839.01 for a total due of \$11,176.48, a tax deficiency of \$10,667.05 plus interest of \$3,733.47 for a total due of \$14,400.52, a tax deficiency or \$22,903.40 plus interest of \$7,138.23 for a total due of \$30,041.63, and a tax deficiency of \$11,808.69 plus interest of \$2,676.64 for a total due of \$14,485.33. The tax deficiencies for the five years total \$60,859.05.

3. According to the field audit report, the deficiencies resulted from the adjustment of the petitioner's receipts factor since "the taxpayer is a selling agent and ... the receipts factor should be computed by the ratio of

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<sup>1</sup> In 1976, petitioner changed its name to Tradearbed, Inc. from Amerlux Steel Products Corporation. The tax reports for the years at issue are in petitioner's former name.

<sup>2</sup> Petitioner on its original reports for the 1971 and 1972 years allocated 100 percent of its entire net income to New York. It later filed amended reports for these years which show the business allocation percentages noted above for such years.

commissions earned by the New York office to commissions earned everywhere. Gross sales ... pertaining to the above commission transactions should be omitted from the computation." The adjustment of petitioner's receipts factor resulted in revised business allocation percentages for the years 1971 through 1975 as follows:

<u>YEAR</u>	<u>BUSINESS ALLOCATION PERCENTAGES AS REVISED BY THE AUDIT DIVISION</u>
1971	88.6209
1972	87.6283
1973	88.6320
1974	84.0432
1975	85.64856

4. Petitioner is a New York corporation whose primary business activity is the importing of carbon steel products including structural steel for the construction industry, merchant bars for machinery, and hot rolled and cold rolled sheet products for the automotive and appliance industries. General and executive offices are located at 825 Third Avenue, New York City, New York. Petitioner also has an office in Canada which, according to a rider attached to its amended corporation franchise tax report for 1971, is located at 1010 St. Catherine Street West, Montreal, Quebec. In addition, the rider noted that "(t)he office in the United States employs about 25 individuals;<sup>3</sup> the office in Canada employs about 5 individuals".

5. Fernand Lamesch, who was vice-president of petitioner during the tax years at issue and who, since the beginning of 1976, has been president of petitioner, testified that during the tax years at issue 98 percent of petitioner's

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<sup>3</sup> Fernand Lamesch testified that petitioner "currently employ(s) sixty (60) people in New York State".

stock was owned by Tradearbed Luxembourg,<sup>4</sup> an alien corporation. Tradearbed Luxembourg is the selling arm for Arbed, an alien producer corporation. Mr. Lamesch testified that though he didn't "know exactly in which way, but (these corporations) are all part of (the) Arbed group".

6. During the tax years at issue, petitioner operated as a trading company which was affiliated with the producing mill, Arbed. It solicited business around the United States and then negotiated with Tradearbed Luxembourg for price and availability of the goods it sold. Petitioner bought the product from Tradearbed Luxembourg in its own name for the account of a specified customer, and the product was produced by Arbed according to the customer's specifications. The petitioner insured the product when it was identified at the mill and was to be loaded on a rail car that brought the merchandise to the port of shipment. Petitioner did not have any inventory or stock on hand other than what Mr. Lamesch termed "undesired inventory" consisting of steel which had been rejected by a customer.

7. Mr. Lamesch testified that it "may be a little bit too strong "to say that petitioner purchased nearly 100 percent of its goods from Tradearbed Luxembourg, but it was "surely better than 90 percent". He testified that petitioner also purchased directly from Clabecqsa, a Belgian mill, Thy - Marcinelle, a major plate producer, and from local representatives of such firms as Marshall Loeb, Phillip Brothers, or Wimpfheimer. However, no documentary evidence was introduced to substantiate purchases from sources other than the petitioner's affiliated source.

8. Mr. Lamesch testified that during the tax years at issue, petitioner had the right to buy its steel from any source. He testified that it was a

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<sup>4</sup> Tradearbed Luxembourg was formerly named Comptoir Metallurgique.

decision of petitioner's conservative management during the tax years at issue to purchase almost all of its steel from its affiliate source.

9. Petitioner's contract of sale with its customers provides that "THIS ORDER IS SUBJECT TO OUR MILL'S FINAL ACCEPTANCE."

10. For the five tax years at issue, the petitioner's average gross sales were \$67,169,755.00 and its average gross profit was \$353,556.00. Petitioner also received on such sales commissions averaging \$884,555.00 or 1.32 percent of gross sales for each of the five tax years. Mr. Lamesch testified that the "commissions", though designated as such during the years at issue, were in fact a "discount" or an "exporter's rebate", and that the import duty imposed by the United State Customs was on an amount from which the "commissions" were subtracted.

#### CONCLUSIONS OF LAW

A. That Tax Law section 210.3 provides for the allocation of a portion of a taxpayer's entire net income to New York on the basis of a formula consisting of three factors (expressed as percentages) namely, the taxpayer's real and tangible personal property, business receipts and payroll. The percentages of these three factors result from fractions, the numerator of which is the property, receipts or payroll within New York and the denominator of which is all property, all receipts and all payroll of the taxpayer. The three resultant percentages are totalled and divided by three to arrive at the taxpayer's business allocation percentage. 20 NYCRR §4.12.<sup>5</sup>

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<sup>5</sup> Regulations cited herein are those which were effective for the tax years at issue.



B. That 20 NYCRR §4.20(b) provides as follows:

"Commissions received by the taxpayer are allocated to New York if the services for which the commissions were paid were performed in New York. If the taxpayer's services for which commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York office of the taxpayer, the taxpayer's services will be deemed to have been performed in New York."

C. That based upon the facts that (i) petitioner maintained no inventory, (ii) purchased "better than 90 percent" of its steel from Tradeared Luxembourg which owned 98 percent of petitioner's stock, (iii) its form contract of sale provided that the customer's order is subject to "our mill's final acceptance", (iv) purchases made by petitioner from Tradeared Luxembourg were for the account of a specified customer and were produced according to petitioner's customer's specifications, and (v) payments received by petitioner for Tradeared Luxembourg were designated "commissions", it was reasonable for the Audit Division to treat petitioner as a selling agent of Tradeared Luxembourg.


D. That petitioner did not sustain its burden of proof under Tax Law section 1089(e) to show that it was not a selling agent of Tradeared Luxembourg. In particular, petitioner failed to document that it obtained its steel products from suppliers other than the affiliated source during the tax years at issue. In addition, it is not possible to determine if petitioner's receipts may be appropriately apportioned between commissions from Tradeared Luxembourg and receipts from the sale of taxable personal property which was acquired by petitioner from other suppliers and then sold to its customers.

E. That the petition of Tradeared, Inc. is hereby denied and the notices of deficiency dated December 15, 1978 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER